August 28, 2000

Honorable Carol M. Browner, Administrator
U.S. Environmental Protection Agency
ATTN: Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Browner:

The purpose of this letter is to provide the comments of the American Road and Transportation Builders Association (ARTBA) on the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs" and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits" proposed by the U.S. Environmental Protection Agency in the *Federal Register* of June 27, 2000 (Volume 65, Number 124, pages 39649-39701).

As you know, ARTBA represents 5,000 member organizations in the Nation's transportation construction industry, including construction contractors, professional engineering firms, heavy equipment manufacturers, and materials suppliers. Our member companies employ more than 1,000,000 people in the transportation construction industry in the United States.

As an overall general comment, we believe that EPA's revised draft guidance represents a substantial improvement over the 1998 Interim Guidance. Despite these improvements, however, the guidance is still in need of substantial revision because it will not provide the predictability and certainty regarding environmental permits that are absolutely essential for all stakeholders. For that reason, we urge substantial further revisions, as described in these comments, before EPA issues the draft Guidance in final form.

ARTBA is committed to working with EPA and other stakeholders to address environmental justice concerns. We hope that the enclosed comments will help EPA in this regard.

Sincerely,

T. Peter Ruane

T. Peter Ruane
President and CEO

Enclosure

Comments of the American Road and Transportation Builders Association
on the "Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs"
and "Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits"
proposed by the U.S. Environmental Protection Agency
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Background

The American Road and Transportation Builders Association (ARTBA) represents 5,000 member organizations in the Nation's transportation construction industry, including construction contractors, professional engineering firms, heavy equipment manufacturers, and materials suppliers. Our member companies employ more than 1,000,000 people in the transportation construction industry in the United States.

ARTBA believes that all people should be treated fairly under all laws, including environmental laws, without discrimination based on race, color, or national origin. We support efforts to positively affect human health and the environment and the use of scientifically sound risk assessments in evaluating and prioritizing health and environmental risks.

Introduction

We believe that EPA has coordinated the provisions of the two guidance documents well. Because they contain identical concepts, we intend that our comments apply to both documents. For this reason, we do not repeat a comment made on the draft Recipient Guidance in comments on the draft Investigation Guidance. In some cases, to help EPA clearly identify the concept that we are commenting upon, we refer specifically to a June 27, 2000, Federal Register page number in one or the other document. In such cases, we intend for our comments to apply to both. We expect that EPA will make the ultimate revised documents consistent with each other, as is the case with the drafts.

Other EPA documents, and information occasionally supplied by EPA's Regional Offices of Civil Rights and of Environmental Justice, also need to be made consistent with these two guidance documents. Specifically, EPA's April 1998 *Guidance for Incorporating Environmental Justice in EPA's NEPA Compliance Analyses* and C*lean Air Act Section 309 Guidance* contains direction that is at odds with the two draft Guidance documents. To some extent, the older guidance risks causing a finding of disparate impact in a NEPA document that would not be upheld upon investigation under the draft Guidance. It is important to avoid raising the expectations of complainants in a NEPA process if a conclusion will be reversed once a complaint reaches EPA HQ Office of Civil Rights.

General Comments

In some respects, EPA's revised draft guidance represents a substantial improvement over the 1998 Interim Guidance. Despite these improvements, the guidance is still in need of substantial revision because it will not provide the predictability and certainty regarding environmental permits that are absolutely essential for all stakeholders. For that reason, we urge substantial further revisions, as described in these comments, before EPA issues the draft Guidance in final form.

Because of EPA's lead role in applying Civil Rights legislation that was never originally envisioned to address environmental conditions, and in implementing related Executive Order 12898 (Environmental Justice), other Federal agencies, states, counties, cities and districts who are developing their own environmental justice policies naturally will look to EPA for guidance. Although EPA intends that the draft Guidance apply to a narrow set of permitting circumstances, it is nevertheless a model that will be used in ways not conceivable by the drafters of the Guidance. We encourage EPA to take this into account when finalizing the draft documents. To the extent possible, EPA should think about how this draft Guidance will be used by those who are not permit-issuing agencies nor EPA funding recipients. EPA should attempt to ensure that the concepts are generally applicable to broader issues of Title VI compliance.

Specific Comments

Overall Comment. We note that the draft Guidance correctly uses the term minority "population" as opposed to minority "community" or "neighborhood." Many EPA Regions, and EPA's April 1998 *Guidance for Incorporating Environmental Justice in EPA's NEPA Compliance Analyses*, use and apply the terms interchangeably. The significance of this is far more than semantics. The interpretation of what constitutes a population influences the outcome of an analysis of disparate effect. For example, it is possible to make a determination that an impact falls disproportionately on minority *neighborhoods*, when the impact falls predominantly on the *non*-minority *population*. This occurs because geographic areas described as minority neighborhoods or communities nevertheless contain non-minority populations. We encourage consistent use of the term "population" and further encourage revision of the *Guidance for Incorporating Environmental Justice in EPA's NEPA Compliance Analyses* to be consistent with this comment.

Page 39652. EPA notes that the draft Guidance eliminates the term "complete or properly pleaded complaint." We appreciate the stated goal of minimizing confusion. And, while we agree that the term "complete or properly pleaded complaint" can be confusing in an administrative process, we suggest that the word "complete" be retained. We believe that the concept of complete is not confusing and that complaints containing incomplete information should be returned to the complainant. It is not reasonable to use EPA or a recipient agency's time on complaints that are incompletely or incoherently developed.

Page 39657. One approach to broad program-level Title VI involvement by grant recipients mentioned by EPA is the area-specific approach. In this approach, recipient

agencies would "identify geographic areas where adverse disparate health impacts or other potential Title VI concerns (e.g., where translation of documents may be necessary) may exist." While this sounds reasonable, it would have an unintended consequence that should be weighed by permitting agencies before adopting the approach. Using the analogy from the Clean Air Act, this would effectively designate areas as "non-attainment for Title VI." Just as new industry is loath to locate in areas that are non-attainment of air quality standards, we are aware that, as predicted by Detroit's mayor, the same is true of areas where the level of environmental justice controversy is high. While this may be a favorable outcome to the extent that it prevents the siting of dirty industry, it has also prevented the siting of comparatively benign industries that are increasingly including environmental justice as a siting criterion. Absent job growth in depressed areas, it will be a very long time before economic and environmental justice is achieved. We are, therefore, very concerned whenever policies inadvertently create economic avoidance zones among the populations that most need economic development.

Page 39674. The principle of informal resolution of a dispute is sound. In addition, the summary of alternative dispute resolution methods is a helpful reminder. We realize that this suggested approach will be viewed by some recipients, and undoubtedly used by some complainants, as extortion in advance of filing a complaint. This is regrettable. Nevertheless, it offers the potential to reduce the number of complaints and reach locally satisfying solutions. Since, like all parts of the draft Guidance, informal resolution is voluntary, the extent to which it can be used inappropriately can be controlled.

Page 39653. EPA notes that, "denial of the permit at issue will not necessarily be an appropriate solution." This is an important concept. It is also appropriate, for the reasons explained by EPA. We encourage keeping this type of language, which seeks practical solutions, in the final documents.

Page 39677, VI.B.1.a. The second bullet indicates that, "Permit actions, including…renewals…that allow existing levels of stressors, predicted risks, or measures of impact to continue unchanged" could form the basis for initiating a Title VI investigation. While we understand the rationale for this, we strongly disagree with the notion of potentially opening the same argument each time a permit is renewed, even though the emissions have not changed. It is unfair to the permit holder to reexamine the permit on this basis upon each renewal, especially given that changes in circumstances beyond the control of either the permit holder or the issuing agency could cause a finding of disparate impact…even when the emissions have not changed. An example of this would be when the minority population in the impact zone has increased due to normal population growth. Another example would be when unregulated sources, not under the control of the permitee, have increased over time. We think this is unreasonable and should be eliminated from the Guidance.

Page 39683. Clearly, permitting actions can never have equal impacts on all segments of the population and a discriminatory effect may be found where there was no discriminatory intent. We are pleased to see that this weakness in EPA's regulations,

which call for EPA to act upon discriminatory effects which may be unavoidable, is to some extent counterbalanced by the Guidance's provision for justification of an impact.

The draft Guidance appropriately points out several types of justification. Three additional types of justification should be added:

a. when there is no reasonable or feasible alternative to the proposed action, considering cost and other factors;

b. when the action satisfies an overriding public need; and

c. when other existing permitted facilities under the recipient's authority are taken into consideration, the recipient's actions overall do not have discriminatory effect. This acknowledges that risks, impacts, and populations are never equally distributed. In some individual permitting actions, the non-minority fraction of the population is disparately impacted. Consequently, a recipient's compliance with EPA's Title VI regulations over its whole program should be sufficient justification for keeping its EPA funding, even though one specific permitting action may be found to have a disparate effect on the minority population.

We see no reason to confine the economic development justification to only those benefits that are delivered *directly* to the affected population. It seems that the justification for an impact has always been the provision of a benefit, whether direct, indirect, or induced.

We note that the concept of justified disparate effect is missing from EPA's April 1998 *Guidance for Incorporating Environmental Justice in EPA's NEPA Compliance Analyses*. We suggest that the 1998 Guidance be revised to include the necessity of considering whether disproportionate effects are justified. Otherwise, when EPA or grant recipients disclose a disparate effect in a NEPA document, without considering justification, it can stimulate a complaint that would not later be found in violation of EPA's rules or of the Civil Rights Act. This wasteful and painful outcome is avoidable.

Page 39678. The statement, "In determining the nature of stressors (e.g., chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider…" is appropriate. However, it is effectively contradicted by the next statement in this paragraph, which reads, "These could include…laws and regulations that involve broader, cross-cutting matters, such as state environmental policy acts." State environmental policy acts encompass such a broad range of human and environmental elements that an air permitting agency would be considered to have authority over practically every element of the built and natural environment. We suggest that EPA leave jurisdiction over plants, animals, housing, etc. with the states through their environmental policy acts, and not attempt to encompass it within the draft Guidance nor to indirectly bring it under EPA's authority through consideration in investigation of Title VI complaints.

Page 39661. We appreciate that EPA has endorsed the use of 1990 Census data in analyses. Although serious analysts discovered long ago that the 1990 Census, with all its imperfections, is the most applicable and practical source of information, the matter

continues to be contested. To minimize the continued argument, we recommend that EPA issue a bulletin to its Regions explaining the rationale for using the 1990 Census (until 2000 Census data become available).

Page 39661. The choice of a reference population, to which the affected population will be compared, is perhaps the single most controlling factor in whether a finding of disparate impact will be made or not. EPA had historically advocated using a geopolitical boundary, and retains this as one option in the current draft. Unfortunately, with respect to any particular project, emission, or affected population, a jurisdiction's border is merely an arbitrary line…no more relevant than a 2-mile, 5-mile, or 10-mile radius. Consider this: If a city annexes new territory, the result of a disparate impact analysis will change; although the disparity would not have changed at all. We suggest that EPA acknowledge that a geopolitical or district boundary is rarely relevant and should only be used when a more appropriate area cannot be found.

The draft Guidance comes closer to identifying a relevant boundary in mentioning use of an airshed or watershed. These *can* be directly related to the proposed action in some cases. So, the concept of using the appropriate bioregion as the reference population is sound. We suggest that this option be mentioned first in the draft Guidance, not minimized by introducing it almost as an afterthought.

A yet more appropriate reference area is one that has a specific relationship to the project/action and to the decision being made. This reference population would be bounded by the line that encompasses those who will be or might have been impacted, both positively and negatively, by the proposal and its alternatives. This captures the area in which choices can be made…which is the classic civil rights issue (i.e., who is getting the benefit and who is suffering the impact). For example, we could choose to impact Population A by implementing Alternative A. Or, we could impact Population B by implementing Alternative B. Using this reference population captures an area that has a direct relationship with the proposed action, defines the area within which choices can be made, and is not an arbitrary line. We acknowledge that this can't be the only definition of a reference population, since in some cases the benefited area is hard to identify. But, it can be one of the preferred definitions and used when it applies.

Page 39670, II.A.1 & 2. We note that the recipient will have 30 days from receiving Acknowledgment of Complaint in which to respond (II.A.1). However, EPA will decide whether to accept the complaint within 20 days of acknowledgment (II.A.2). We suggest that the timeframes be altered so that EPA makes a determination as to whether it satisfies the jurisdictional criteria *before* the recipient's 30-day response period begins. This will avoid the potential that a recipient will work for 20 days preparing a response to a complaint that EPA rejects based on jurisdictional criteria.

Page 39670, II.A.3 Investigation. Factually, determining whether a permit at issue adds to an *existing* adverse disparate impact is a large undertaking by EPA, since it would require conducting a disparate impact analysis of existing conditions, followed by one on the sum of existing and proposed conditions. Furthermore, if a recipient is to attempt to

avoid a complaint, they would first have to conduct their own cumulative analysis for each permitting action in order to determine whether they are having an *additive* disparate effect or not. We question whether this is a reasonable burden to place on recipients. Perhaps a more workable approach is to ascertain whether the proposed action, itself, has a discriminatory effect.

Page 39670, footnote 63. We suggest, for convenience of the reader, that the reference in this footnote be replaced with the actual criteria.

Page 39671, II.A.6 & 7. We note that the recipient will have 10 days within which to come into voluntary compliance before EPA will start the process of terminating funding. However, the recipient has 30 days to file an answer to the determination of non-compliance. This means that EPA may already be 20 days into the process of terminating funding at the time a recipient files a legitimate explanation of why the determination of non-compliance was in error. We suggest that these timeframes be changed to avoid this.

Page 39671, II.A.7. This section states that, "…all parties will be given reasonable opportunity to file written statements." Since there is no definition of how long "reasonable" is, we suggest that the language be changed to read, "…all parties will be given 30 days to file written statements."

Page 39672, III.A.(3). This section specifies that a complaint will be considered timely filed if it is filed within 180 calendar days of the alleged discriminatory act. Because the process of considering and issuing a permit takes a considerable amount of time, complainants have months in which to understand whether they are disparately impacted or not, and to decide whether to file a complaint. It is unreasonable to allow 180 days for this filing, since permittees will have already made substantial commitments under the authority of the permit by this time. We suggest 60 days as a more reasonable timeframe. We realize that this requires changing EPA's regulation 40 CFR 7.120(b)(2). Consequently, we request that the regulation be amended accordingly.

Page 39676, VI.A. Step 1. We recommend changing the language in the third bullet which reads, "…determine whether the permit action that triggered the complaint significantly decreases those pollutants of concern…" to read, "…determine whether the permit action that triggered the complaint significantly decreases *emissions of* those pollutants *from the permitted facility which are* of concern …" Otherwise, the sentence, as written, might be construed to mean that, for example, a small particulate-emitting facility would have to significantly reduce ambient concentrations of particulates in the airshed before EPA would close the investigation. Note that small emitters who make significant reductions in their own emissions would not have the potential to make a significant reduction in pollutant levels in ambient conditions beyond a very localized area. EPA should close the investigation when an emitter makes a significant reduction in its own emissions, irrespective of the magnitude of effect this may have in the ambient environment.

Page 39680, VI.B.4. We suggest changing the title of this subsection from "Adverse Impact Decision" to "Significant Adverse Impact Decision" in order to make it consistent with the text.

Additionally, we support the concept that an impact must be significant in order for it to be considered further in an investigation.

Page 39681, VI.B.5.a. Use of mathematical models and other quantitative methods of predicting the "footprint" of the impact zone is sound. We have been dismayed by approaches we have seen in NEPA Environmental Justice analyses that used arbitrarily-drawn circles around a facility to represent impact zones and, sometimes, reference populations. The Guidance inappropriately supports this crude approach as an alternative to the use of quantitative predictors, when better predictors are inapplicable. We agree that there could sometimes be situations when a quantitative model cannot be used and a well-reasoned approximation is the only choice. However, we encourage the Guidance to stress that this alternate approach is very crude and should only be used as a last resort, lest it become a convenient default when quantitative prediction is merely more difficult to perform.

Page 39681, VI.B.5.b. While we are aware that some EPA Regions consider the statewide average minority population percentage to be meaningful in a comparison, and some publish maps that show "minority" areas that are a small multiple of the statewide average, it is exceedingly rare when a state's population would be an appropriate reference population. It is a statistical fact that, the more unlike the reference population is from the impacted population, the more likely a call of disparity will be [erroneously] made. The percentage minority in an entire state is almost always very different from any particular smaller area (e.g., an impacted population). Consequently, indiscriminate use of such a large area as a reference population introduces bias into an analysis.

Page 39681, VI.B.5.b. The comparison described in the fourth bullet practically assures a finding of disparity in every permit action. By subdividing the minority population "by demographic group" (e.g., disaggregating the population into its component races and ethnic groups) EPA is almost certain to find a disparity involving *some* race. Except where the impacted population is 100% non-minority, it would be exceedingly rare to find that the percentage of all impacted races is roughly equal to their percent occurrence in the general population. We recommend that the analysis consider the minority population as a whole to avoid this unworkable outcome and because we see no real justification for doing otherwise.

Page 39681, VI.B.6. We fully appreciate the difficulty in defining the point at which a significantly adverse impact has reached the level of "disparate effect" on the minority population. We also acknowledge that there are two frameworks in which disparity can be considered (wide disparity in the level of risk or impact, and wide disparity in the proportion of minorities to non-minorities exposed to the risk or impact) and that any particular analysis may show great disparity by one measure and not by the other. Overarching these dilemmas, however, are two necessities which provide the context

within which to begin to solve the dilemma. First, a threshold of disparity must be set sufficiently high that it does not practically preclude all development, nor development in predominantly minority locations. Secondly, since discrimination is a very serious charge, the degree of disparity that triggers this determination should be equally serious. In general, we agree with EPA that a disparity measured at three standard deviations from the mean is appropriate. Consistent with this, we have some specific comments on the eighth paragraph in VI.B.6.

In making a finding of disparate impact, we believe that the disparity must be wide in *both* the level of risk or impact *and* in the proportion of minority-to-nonminority persons exposed. The rationale for this is, it would be inappropriate to adjudge a discriminatory effect on the minority population when, for example, twenty minority individuals out of 100 people are exposed to an intense (i.e., three standard deviations) adverse impact while 80 non-minority individuals are similarly exposed. Conversely, it would be equally inappropriate to determine that the threshold of discrimination has been reached, even if 98 of 100 exposed individuals are minority, when the risk or effect is below a threshold of significance. Consequently, *both* thresholds need to be exceeded before reaching a conclusion as serious as racial discrimination.

This would also eliminate the need for EPA to "attempt to balance these factors" when one measure indicates disparity and the other does not. We know of no objective method to achieve this balance. Consequently, any attempt would merely lead to unproductive argument.

We are puzzled by the statement in the eighth paragraph that reads, "Similarly, where the disparity of both demographic characteristics and impacts are relatively slight, a finding of disparate impact is somewhat less likely (e.g., in cases where both the disparity of impact and demographics are not statistically significant)." When the disparity in both cases is slight, there should be *no* finding of disparate impact.

Page 39683 VII.A.1. In describing justification, the draft Guidance indicates that, "Generally, the recipient would attempt to show that the challenged activity is reasonably

necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission." Note that many legitimate and important activities are not integral to the recipient's institutional mission, since the recipient is typically only performing a regulatory function. A legitimate and important project like a power plant or temporary installation of an asphalt batch plant (to support needed facility construction) is not integral to any recipient's mission. Consequently, we suggest that the draft Guidance be revised here and throughout to read, "Generally, the recipient would attempt to show that the challenged activity is reasonably necessary to meet a goal that is legitimate and important."

Page 39690. This section says that, "Under the draft Revised Investigation Guidance, OCR expects that any type of permit actions…could form the basis for an investigation if the permit allows existing levels of alleged adverse disparate impacts to continue

unchanged or causes an increase (e.g., landfill capacity doubled)." We ask that the clause in parentheses be omitted. The common misconception, that the presence of undesirable *facilities* rather than actual *impacts* is sufficient demonstration of discrimination, is the source of many unproductive complaints. We don't believe that EPA intended to perpetuate this misunderstanding by the example used in the draft Guidance.

Conclusion

As mentioned above, we believe that EPA's revised draft guidance represents a substantial improvement over the 1998 Interim Guidance. Despite these improvements, however, the guidance is still in need of substantial revision because it will not provide the predictability and certainty regarding environmental permits that are absolutely essential for all stakeholders. For that reason, we urge substantial further revisions, as described in these comments, before EPA issues the draft Guidance in final form.

ARTBA is committed to working with EPA and other stakeholders to address environmental justice concerns. We hope that these comments will help EPA in its efforts in this regard.

jdeason@artba.org on 08/28/2000 01:15:43 PM

To: Group Civilrights
cc:

Subject: Additional Comments of the American Road and Transportation Builders Association

August 28, 2000

Honorable Carol M. Browner, Administrator
U.S. Environmental Protection Agency
ATTN: Office of Civil Rights (1201A)
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Our earlier comments, which the enclosed document supplements, were provided to you by electronic mail over the past weekend.

Sincerely,

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Enclosure

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Introduction

This document provides additional comments on the subject documents from the American Road and Transportation Builders Association to supplement our earlier comments that were provided by electronic mail.

Additional General Comments

EPA's Title VI regulations address deferring to other federal agencies

with jurisdiction over a Title VI matter. 40 C.F.R. 7.125. We request that EPA's final guidance clarify that EPA will defer to the various Department of Transportation agencies, the Army Corps of Engineers, and the Department of the Interior in matters relating the jurisdiction of those agencies under the transportation statutes, Clean Water Act Section 404, and the Endangered Species Act, respectively.

Because the Clean Air Act does not infringe on local land use authority (42 U.S.C. 7431) and its definition of "conformity" (42 U.S.C. 7506(c)) does not include environmental justice concerns, we request that EPA clarify that a Clean Air Act conformity determination does not provide the occasion for revisiting any environmental justice issues raised by the underlying land use and emission reduction decisions inherent in the underlying State Implementation Plan (SIP) and transportation plan or project. Where the Clean Air Act sets forth the specific criteria required for an affirmative determination, Title VI does not supplement those criteria.

Additional Specific Comments

Page 39654. Under EPA's proposed approach for Title VI, EPA's Office of Civil Rights (OCR) would assess whether an impact is both adverse and borne disproportionately on the basis of race, color, or national origin and, if so, would allow the recipient to show (as an "affirmative defense") that the disparate treatment is justified. This approach falls outside EPA's Title VI authority. Title VI itself prohibits only intentional discrimination, but Supreme Court decisions suggest that agencies may issue regulations that prohibit unjustifiable disparate impact discrimination. E.g., Alexander v. Choate, 469 U.S. 287, 292-93 (1985). To prohibit (by regulation) unjustifiable disparate impact discrimination, however, EPA must point to evidence that such discrimination occurs. Bowen v. American Hospital Association, 476 U.S. 610, 643 (1986). Thus, to expand the scope of Title VI's coverage by regulation, EPA's rulemaking must identify the unjustifiable disparate impacts that its rule will prohibit. For example, in Lau v. Nichols, 414 U.S. 563, 566-67 (1974), the Court found that San Francisco schools violated Title VI by failing to teach Chinese schoolchildren in Chinese, referring to regulations issued by the Department of Health Education and Welfare requiring recipients to rectify students' language deficiencies. EPA's regulated community needs similar specificity in EPA's Title VI regulations. Instead, EPA's proposed guidance provides a blanket statement that the OCR will decide what is or is not unjustifiable disparate impact discrimination in any particular context. Congress did not delegate such ad hoc authority to OCR and neither Congress nor the Administrative Procedure Act allow EPA to delegate such authority to OCR. Moreover, neither EPA's 1973 nor 1984 Title VI rulemakings provide the required express basis for expanding Title VI's race-based intentional discrimination standard to a disparate impact discrimination standard regarding exposure to pollutants caused by environmental permitting programs. Since the underlying rulemakings did not do so, EPA cannot do so by issuing an interpretive rule or guidance statement.